Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PICKENS MECHANICAL CONTRACTORS, INC.;
HOWARD D. PICKENS AND SALLY M. PICKENS,
HUSBAND AND WIFE,
Petitioners,

v.

FIRST ENTERPRISE BANK, OKLAHOMA CITY, OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is discrimination and banking fraud against the wife of a customer, borrower, and civil litigant which was found by a state trial court to have been committed by a lending/banking institution but wrongfully reversed by state civil appeals courts a basis for post judgment relief and reversal of the state civil appeals courts' decision as relates to the Equal Credit Opportunity Act, (ECOA) and 29 C.F.R. § 202.7(d).

2. Whether state civil appeals court decisions and state trial court decisions and interpretations of federal law such as the Equal Credit Opportunity Act supercede and control contrary decisions by federal courts.

PARTIES TO THE PROCEEDING

Petitioners, Pickens Mechanical Contractors, Inc.; Howard D. Pickens and Sally M. Pickens, husband and wife, are residents of McClain County, Oklahoma. They were Defendants and Counter-Claimants in the Trial Court, District Court of McClain County, Oklahoma, and Appellees in both the Court of Civil Appeals of the State of Oklahoma and the Supreme Court of the State of Oklahoma.

Respondent, First Enterprise Bank, Oklahoma City, Oklahoma, is a Banking Corporation duly organized and existing under the laws of the State of Oklahoma and of the United States of America, with its principal place of business in Oklahoma City, Oklahoma County, State of Oklahoma; it is not a citizen of Oklahoma. It was the Plaintiff in the Trial Court and Appellant before the Court of Civil Appeals of the State of Oklahoma, and in the Supreme Court of the State of Oklahoma.

There are no other parties to this action.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 8

I. This Petition should be granted because the State Appeals Courts failed to properly consider the Federal Banking law on which the Trial Court correctly awarded judgment to Petitioners herein for illegal discrimination and fraud 8

II. The Petition should be granted because the opinions of the Oklahoma Appeals Courts conflict with federal law and proper interpretations of federal law by federal courts thus depriving Petitioners of due process and their homestead property 11

Conclusion 13

TABLE OF CITATIONS

Constitution Cited:

Constitution of the United States,
Article III, Section 1 2

Constitution of the United States,
Article III, Section 2[1] 2

Constitution of the United States,
Article III, Section 2[2] 2

Constitution of the United States,
Fifth Amendment 2

Constitution of the United States,
Fourteenth Amendment 2, 3

Cases Cited:

State of Oklahoma ex rel. Wilson v. Blankenship,
447 F.2d 687, 691 (10th Cir. 1971),
cert. denied, 405 U.S. 918 (1972) 2

F.D.I.C. v. Medmark, Inc.,
897 F.Supp. 511 (D.Kan. 1995) 4, 11

Silverman v. Eastrich Multiple Investor Fund, L.P.,
51 F.3d 28 (3rd Cir. 1995) 4, 11

Bull v. United States,
295 U.S. 247, 262, 55 S.Ct. 695,
700-01, 70 L.Ed. 1421 (1935) 4

Riggs Nat. Bank of Washington, D.C. v. Linch,
36 F.3d 370, 374 (4th Cir. 1994) 5, 9

CMF Virginia Land, L.P. v. Brinson et al.,
806 F.Supp. 90 (E.D. Va. 1992) 9

Integra Bank/Pittsburgh v. Freeman,
839 F.Supp. 326, 330 (E.D. Pa. 1993) . . . 10, 11

Smith v. Southwestern Bell Telephone Co.,
349 P.2d 646 (Okla. 1960) 12

In Re Remington,
19 B.R. 718 (Bkrtcy.D.Colo. 1982) 12

Comdisco, Inc. v. United States,
756 F.2d 568 (7th Cir. 1985) 12

Statute Cited:

15 U.S.C. §§ 1691 - 1691f 3, 5, 6
15 U.S.C. § 1691e(a) 10

Rule Cited:

Rules of the Supreme Court of the United States,
Rule 10 . . . . . .
Rules of the Supreme Court of the United States,
Rule 13 . . . . . .
Rules of the Supreme Court of the United States,
Rule 14 . . . . . .

Regulation Cited:

12 C.F.R. § 202.7(d) 5
12 C.F.R. Part 202 . . . . . 3, 6

APPENDIX

Appendix A
Denial of Writ of Certiorari by Supreme Court of the State of Oklahoma 1a

Appendix B
Opinion of the Court of Civil Appeals of the State of Oklahoma 2a

Appendix C
Opinion of the District Court of McClain County, Oklahoma 35a

Appendix D
Excerpted Transcript of Trial Proceedings in McClain County, Oklahoma, District Court . . 52a

PETITION FOR WRIT OF CERTIORARI

Petitioners, Pickens Mechanical Contractors, Inc.; Howard D. Pickens and Sally M. Pickens, husband and wife, respectfully request that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Oklahoma.

OPINIONS BELOW

On the 19th of June, 2002, the Supreme Court of the State of Oklahoma denied Certiorari to Petitioners, Pickens Mechanical Contractors, Inc.; Howard D. Pickens and Sally M. Pickens, husband and wife, (Appendix A) request to it to reverse the Court of Civil Appeals of the State of Oklahoma's unpublished decision of the 19th day of March, 2002, in Case Number 95,196 (Appendix B) which reversed the trial court decision, District Court of McClain County, State of Oklahoma in Petitioners' favor on the 4th day of August, 2000 (Appendix C).

STATEMENT OF JURISDICTION

Petitioners, Pickens Mechanical Contractors, Inc.; Howard D. Pickens and Sally M. Pickens, husband and wife, seek review of the opinion of the Court of Civil Appeals of the State of Oklahoma and its judgment of March 19, 2002. The Supreme Court of the State of Oklahoma affirmed the opinion of March 19, 2002 of the Court of Civil Appeals of the State of Oklahoma by denying certiorari of a timely filed Petition for Certiorari by Petitioners on June 18, 2002.

The certiorari jurisdiction of this Court is invoked under Article III Section 1 and 2[1] of the Constitution of the

United States and the Fifth and the Fourteenth Amendment to the Constitution of the United States of America.

This case is directly concerned with the construction of federal law and a determination of rights thereunder. *See State of Oklahoma ex rel. Wilson v. Blankenship*, 447 F.2d 687, 691 (10th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article III Section 1 of the Constitution of the United States provides: "Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts..."

Article III Section 2.[1] provides "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...."

Article III Section 2.[2] provides: "In all Cases...the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact..."

The Fifth Amendment to the United States Constitution provide in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...."

The Fourteenth Amendment to the United States Constitutions provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 - 1691f prohibits discrimination in lending practices based, among other things, upon marital status.

The Board of Governors of the Federal Reserve System is regulated by 12 C.F.R. Part 202.

Rules of the Supreme Court of the United States, Rule 10 provides: "Review on a Writ of certiorari is not a matter of right, but of judicial discretion....The following,...indicate the character of the reasons the Court considers: b. ... a state court of last resort has decided an important federal question in a way that conflicts with the decision ... of a United States Court of Appeals."

STATEMENT OF THE CASE

The fundamental question is whether a clear finding of discrimination and fraud against the wife of a borrower by a bank and the violation of the Equal Credit Opportunity Act (ECOA), a federal law, by a state trial court can be reversed by the state civil appeals courts where the evidence wholly supports the trial court finding and the state appeals courts had no basis for finding the trial court abused its fact finding powers. The state trial court properly attempted to enforce the federal law and the state appeals court reversed it. The state courts of last resort conflict with decisions of United States Courts of Appeals.

The Oklahoma Civil Appeals Court and the Supreme Court of the State of Oklahoma both ignored the federal case law as to Petitioners' rights to recover on their counter-claims and as to statutes of limitations which interpret the Equal Credit Opportunity Act (ECOA). These state appeals courts likewise ignored the trial court's proper finding of fact and law as to fraud against the wife of the borrower.

The Oklahoma Civil Appeals Court in its opinion (Appendix B, pages 12 -14) failed to address any of the federal cases interpreting the Equal Credit Opportunity Act (ECOA) and the Statute of Limitations issues cited by Petitioners, Pickens Mechanical Contractors, Inc,; Howard D. Pickens and Sally M. Pickens, husband and wife, in their state appellate court briefs and ruled on by the trial court (Appendix C, page 10, paragraph 5). Although an affirmative claim for relief under the Equal Credit Opportunity Act (ECOA) may be barred by limitation, an affirmative defense to liability on the note is not. *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511 (D.Kan. 1995); and, *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995) quoting from *Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 700-01, 70 L.Ed. 1421 (1935) in holding that claims by way of recoupment are "never barred by the statute of limitations so long as the main action is timely." The State Appeals Court flagrantly attempts to give its opinions and wrongful interpretations of federal law primacy over controlling United State Court of Appeals decisions that protect borrowers rights to urge counter-claims against abusive lending institutions and banks whether licensed and chartered by federal or state authorities.

The trial court found from the credible evidence that Sally M. Pickens, wife of borrower Howard D. Pickens, was coerced and forced by the Respondent Bank to join in a

business loan for Petitioner Pickens Mechanical Contractors, Inc. Howard D. Pickens was the sole owner of the business and he and his company were not evaluated individually for the loan as required by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §1691. Howard D. Pickens should have been the sole borrower. The assignment of the proceeds from the government construction contract at the nuclear facility, Pantex Plant, Amarillo, Texas, was deemed adequate. Furthermore, it is a matter of record that neither Pickens Mechanical Contractors, Inc., nor Howard D. Pickens were evaluated individually for creditworthiness -- a violation of Equal Credit Opportunity Act (ECOA) in and of itself. (TR1 at 134, TR1 at 35-36)(Appendix D). *See Riggs Nat. Bank of Washington, D.C. v. Linch*, 36 F.3d 370, 374 (4th Cir. 1994) [determinative issue on Equal Credit Opportunity Act (ECOA) claim is whether Respondent Bank made determination that Howard D. Pickens, husband, was not independently creditworthy *before* it requested Sally M. Pickens, wife, to guarantee loan].

The Federal Reserve Board regulations, at 12 C.F.R. § 202.7(d) provide:

> "Except as provided in this subsection, a creditor shall not require the signature of an applicant's spouse or other person, *other than a joint applicant*, on any credit instrument if the applicant qualifies under the creditor's standard of credit worthiness for the amount and terms of the credit requested." (emphasis added).

Del Garrett, President of Respondent, testified that he believed at the time of the origination of the loan that the government contract would be sufficient collateral for the

loan. (TR1 at 35-36)(Appendix D). Sally Pickens should in no way be considered a joint applicant for the loan, and the trial court's judgment should be upheld. This was a clear pattern of behavior by a bank to attempt to illegally discriminate against Petitioner Sally M. Pickens and it committed fraud against her to do it.

This is a case where federal law and the United States Court of Appeals decisions protect spouses from overreaching and abuse by powerful lending and banking institutions which owe their rights to do business to federal and state charters and are completely regulated by federal law and the Regulations of the Board of Governors of the Federal Reserve System. Any state appeals court that refuses to even consider or enforce federal law adopted by the United States Congress, such as 15 U.S.C. § 1691 - 1691f must be stopped in its headlong and repeated efforts to thwart efforts to prevent discrimination and fraud in any aspect of a credit transaction committed on the basis of race, color, religion, national origin, sex, marital status, or age.

This statute is implemented and regulated by the Board of Governors of the Federal Reserve System and its Regulation B (12 C.F.R. Part 202).

This is a review of a state court judgment where the federal question of law as to violation of the Equal Credit Opportunity Act (ECOA) was first raised in the original Counter-Claim against Respondent filed with the Court of the first instance, the District Court of McClain County, State of Oklahoma. The issue of federal law was raised by alleging that Respondent Sally M. Pickens' right to protection from illegal discrimination under 15 U.S.C. § 1691 - 1691f was intentionally and wrongfully violated by the Respondent Bank which committed fraud (Appendix C, pages 6-8) against her

(Appendix C, page 2, paragraphs 5 and 6) which has resulted in her being subject to losing her home to foreclosure, due to the failure of her husband's business, of which she had no part. When she has worked, it has been for third parties such as a job selling carpet and furniture, not for her husband, the borrower from Respondent Bank.

The state trial court found from the testimony and evidence that the Equal Credit Opportunity Act (ECOA) was violated (Appendix C, pages 9-10).

The state Court of Appeals did not address the trial courts findings as to decisions of the United States Court of Appeals (Appendix C, pages 9-10) and thus we can give no citation from federal law with which they disagreed. They simply ignored federal courts' decisions (Appendix B, pages 12 - 14).

The federal law issue was timely raised in that it was the original issue and its violation the theory for recovery from the Respondent in Petitioners' original counter-claim and thus, this Court has jurisdiction to review the judgment of the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE UNCONSTITUTIONAL DISCRIMINATION AGAINST SPOUSES OF BORROWERS IS BEING ALLOWED AND ENCOURAGED DESPITE THE EQUAL CREDIT OPPORTUNITY ACT (ECOA) BY THE COURT OF CIVIL APPEALS OF OKLAHOMA AND THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Sally M. Pickens' signing of the guarantee was in fact an illegal requirement for obtaining the loan.

Again, the evidence propounded at trial directly contradicts the Respondent Bank's halfhearted argument that Petitioner Sally M. Pickens was not technically *required* to sign the loan documents. Petitioner Howard D. Pickens testified at trial that at early meetings with bankers there was no mention of Petitioner Sally M. Pickens as co-signer, but when he was told the loan would be made, he was informed at the last moment that he need to have Sally M. Pickens accompany him to the Bank for the signing of the documents (TR3 at 30-31)(Appendix D, page ____). Sally M. Pickens testified that she asked if she had to sign all of the documents and Randy Smith, the loan officer in charge, unequivocally told her "that's what it takes to make the loan." (TR4 at 7-9)(Appendix D, page ____). The trial court, having heard all of the evidence and observed the demeanor of the witnesses, believed that such was the case, and held that Sally M. Pickens indeed had an Equal Credit Opportunity Act (ECOA) claim based on such a requirement. The Bank's argument on

this point simply does not pass muster, and consequently should be rejected by this Court.

Respondent Bank asserts its innocence by claiming that neither Pickens Mechanical Contractors, Inc. nor Howard D. Pickens were ever evaluated on an individual basis to determine their creditworthiness without consideration of Sally M. Pickens' assets. However, not only is this not a defense to liability under the Equal Credit Opportunity Act (ECOA), it is in fact a violation of the Equal Credit Opportunity Act (ECOA). *See Riggs Nat. Bank of Washington, D.C. v. Linch*, 36 F.3d 370, 374 (4th Cir. 1994) [determinative factual issue on Equal Credit Opportunity Act (ECOA) claim is whether bank made determination that husband was not independently creditworthy *before* it requested wife to guarantee loan].

In *CMF Virginia Land, L.P. v. Brinson et al.*, 806 F.Supp. 90 (E.D. Va. 1992), the purchaser of an insolvent lender's assets from the RTC brought an action to recover on a loan guaranty. The Court, in denying summary judgment on this same point, declared that the lender's alleged Equal Credit Opportunity Act (ECOA) violation, if proven at trial, would be sufficient to entitle the guarantors -- including the husbands of the wives whose guarantees were allegedly obtained in violation of Equal Credit Opportunity Act (ECOA) — to recoupment of damage as setoff against the amount owed. Specifically, the court stated: "The Court's decision allows both the male and female defendants to come forward at trial and attempt to demonstrate their entitlement to damages because of the alleged ECOA violation. The Court leaves until trial the issue of whether the male defendants have standing to assert a violation of ECOA when their lender allegedly breached the ECOA by requiring their

wives signature on the Guaranty." 806 F.Supp. At 96, fn. 4.

In this case, the trial court appropriately allowed Petitioner, Howard D. Pickens to demonstrate through evidence at trial that he was in fact damaged by the Equal Credit Opportunity Act (ECOA) violation, and the court awarded damages commensurate with that damage. *See also Integra Bank/Pittsburgh v. Freeman*, 839 F.Supp. 326, 330 (E.D. Pa. 1993) ("A cognizable injury to such a party may occur if – as an objectively qualified loan applicant or guarantor – the party is nonetheless impermissibly required to secure a spouse's or other party's signature pursuant to a loan transaction. The ECOA affords these parties an affirmative cause of action for their 'actual damages sustained' under 15 U.S.C. § 1691e(a)"). The evidence at trial showed that neither Howard D. Pickens nor Pickens Mechanical Contractors, Inc. were evaluated individually and independently for creditworthiness, nor was there any suggestion of a counteroffer of terms for an alternate loan proposal other than that demanded by the Respondent Bank. Howard D. Pickens met his burden to the satisfaction of the trial court, based on adequate credible testimony and evidence.

It is entirely and overly simplistic for the Respondent Bank to argue that Petitioner, Howard D. Pickens has no standing to assert he has been damaged by the Respondent Bank's violation of Equal Credit Opportunity Act (ECOA). When the Respondent Bank wrongfully required his wife, Petitioner Sally M. Pickens to guarantee the corporate loan on behalf of Petitioner Pickens Mechanical Contractors, Inc., the bank theoretically gained the advantage that it would have access to Sally M. Pickens' undivided one-half interest in joint tenancy to the Pickens' homestead. A creditor may not look for payment from parties who, but for the Equal Credit

Opportunity Act (ECOA) violation, would not have incurred personal liability on the underlying debt in the first instance. *See Integra Bank/Pittsburg v. Freeman*, 839 F.Supp. 326 (E.D.Pa. 1993); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995); *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511 (D.Kan. 1995). Only the intervention of this court will prevent this theory from becoming fact. In addition, the entire loan process was tainted and compromised by the Equal Credit Opportunity Act (ECOA) violation such that Petitioner Howard D. Pickens was rightfully entitled to present evidence of his damage at trial.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS OF THE OKLAHOMA APPEALS COURTS CONFLICT WITH FEDERAL LAW AND PROPER INTERPRETATIONS OF FEDERAL LAW BY FEDERAL COURTS THUS DEPRIVING PETITIONERS OF DUE PROCESS AND THEIR HOMESTEAD PROPERTY.

The security agreements, mortgage and guarantees are unenforceable.

The guaranty agreement and other documents executed by Sally M. Pickens were illegally obtained in violation of the Equal Credit Opportunity Act (ECOA). As such, they are null and void. The general rule concerning enforceability of illegal contracts is stated in *CJS Contracts* § 201 as follows:

> An agreement which violates a provision of a statute or which cannot be performed without a violation of such

> provision ordinarily is illegal and void. It is immaterial whether the contract is directly prohibited or arises collaterally out of transactions prohibited by statute. Statutes enacted from considerations of public concern and to subserve the general welfare cannot be abrogated or circumvented by private agreement, and contracts which violate statutes enacted for the protection of the public are generally held illegal.

The Oklahoma Supreme Court has followed this general rule. *See Smith v. Southwestern Bell Telephone Co.*, 349 P.2d 646 (Okla. 1960), in which the court, quoting from a previous case, stated, "Any contract made in consideration of an act forbidden by law is absolutely void, and the illegality of the contract will constitute a good defense at law as well as in equity."

An Equal Credit Opportunity Act (ECOA) defense was held sufficient to constitute a defense to an action brought by a creditor in the case of *In Re Remington*, 19 B.R. 718 (Bkrtcy.D.Colo. 1982). Court have likewise declared unenforceable contracts entered into in violation of the provisions of Regulation Y, a registration also drafted by the Federal Reserve Board, in the case of *Comdisco, Inc. v. United States*, 756 F.2d 568 (7th Cir. 1985).

The Respondent Bank in its appeal cites cases involving Truth in Lending Act violations in which courts have held that disclosure violations do not constitute defenses to liability on the underlying note obligation. It should be noted, however, that the Truth in Lending Act disclosure requirements are intended to provide additional information to debtors entering into otherwise legal contracts. The public

policy purpose of this information is to help debtors make wise decisions. The provisions of the Equal Credit Opportunity Act (ECOA) expressly prohibit marital status discrimination and the requiring of a spouse's signature on the other spouse's separate business debt without first evaluating the said creditworthiness. Equal Credit Opportunity Act (ECOA) is clearly a statute enacted from "consideration of public concern" referred to in *CJS Contracts* cited above. Thus, these two Acts are intended to both protect debtors from abuse and illegal discrimination, not to use one to defeat the good intentions of the other. The legislative intent of Equal Credit Opportunity Act (ECOA) cannot be served by allowing creditors to enforce illegally obtained contractual obligations.

CONCLUSION

This Supreme Court of the United States must not allow the state courts to ignore federal law any more than it can allow lending institutions to abuse and discriminate against spouses of debtors by committing fraud. The loss to this spouse is her home and thus, far too great to tolerate.

Obviously, it has been far too long since this Court rendered an opinion to get the attention of state courts which ignore federal law. Just so, banks must be reminded that they must obey the Equal Credit Opportunity Act (ECOA).

We say this because this violation is so flagrant on their part.

This need to remind state courts and banks is caused by their short memory or perhaps, by the belief that because of their power and resources, they can get away with it long enough to make it profitable.

These practices must be stopped when they threaten to impoverish families, cause them to lose their homes and put them out on the street.

Then the trial court saw this and enforced the federal law. Now, only this Court can prevent the ultimate dissolution of this family's financial security in the nature of its home.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Filed June 18, 2002]

No. 95,186

FIRST ENTERPRISE BANK,	)
	)
v.	)
	)
PICKENS MECHANICAL CONTRACTORS, INC., et al.	)
	)

ORDER

PETITION FOR CERTIORARI IS DENIED. All justices concur.

/s/ _____
Chief Justice

APPENDIX B

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

[Filed March 19, 2002]

No. 95,186

FIRST ENTERPRISE BANK, Plaintiff/Appellant,	)
VS.	)
PICKENS MECHANICAL CONTRACTORS, INC.; HOWARD D. PICKENS and SALLY M. PICKENS, husband and wife, Defendants/Appellees.	)

APPEAL FROM THE DISTRICT COURT OF MCCLAN COUNTY OKLAHOMA

HONORABLE NOAH H, EWING, JR., TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

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OPINION BY KEITH RAPP, ACTING PRESIDING JUDGE:

The trial court plaintiff, First Enterprise Bank (Bank), appeals the judgment in favor of the trial court defendants, Pickens Mechanical Contractors, Inc. (PMC), Howard D. Pickens (Howard), and Sally M. Pickens (Sally).

BACKGROUND

PMC engages in the mechanical contracting business. Howard and Sally are married and they are the officers and directors of PMC. PMC obtained a subcontract in 1990 to perform work on a federal government project and needed financing. Howard is president and sole stockholder of PMC. Sally is the corporate secretary-treasurer and performs occasional administrative services for the business.

This case first revolves around the circumstances under which the Bank loaned money to PMC. The loan was initially secured by the subcontract, PMC's assets, and by Howard's and Sally's personal guarantees and mortgages, including the residence. Subsequently, Howard and Sally provided additional security inthe form of an assignment of a life insurance policy on Howard's life, but owned by Sally. After the loan went into default, the Bank sued for judgment on the promissory note and to foreclose the residential mortgage and it's lien on all the personal property. Howard, Sally, and PMC claimed that the Bank obtained their personal guarantees in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C., §§ 1691-1691f and acted fraudulently and in bad faith by involving Sally personally in the loan transaction.

The second part of this case involves the assignment of the life insurance policy. The Bank had extended payment of the loan several times by written agreement. Howard and Sally claim that the Bank orally agreed to further defer payment for an undefined period of time in consideration of an assignment by Sally of a life insurance policy she owned on the life of Howard. They initially stated only generic

defenses regarding the insurance policy transaction, claiming acceleration of the mortgage was wrongful, and also claiming the foreclosure was bared by the "equitable defenses of estoppel, waiver and laches." Discovery led to the refinement of the claim as: (a) Bank obtained the insurance policy assignmentby fraud and economic duress; (b) the foreclosure action constituted fraud, wrongful acceleration of the note, and bad faith; and, (c) Bank waived its right to sue or was estopped to bring the action to collect on the note and foreclose on the security for the note.

The history of the relationship among the parties began in March of 1990,when Howard, as president of PMC, wrote to the Bank advising that PMC wished to change banks and that PMC had obtained the subcontract valued at $2,825,000.00. Howard's letter stated that PMC needed a floating line of credit of $300,000.00 and proposed to secure that sum by joint payment of the subcontract proceeds and corporate assets not otherwise identified. Howard's letter also requested a standby letter of credit for PMC to be secured by personal real estate.[1]

The Bank assigned a loan officer to the account who advised Howard to prepare his documentation. Howard was not directed to provide any certain documentation. The Bank did not utilize a formal loan application document. Howard then assembled and presented to the Bank corporate tax returns, his and Sally's individual joint tax returns, personal and corporate financial statements, miscellaneous information

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[1] The letter of credit did issue but it expired and is not a part of this litigation. A similar loan request had been made at least two other banks without response from those banks.

and the subcontract. Howard and Sally signed the personal financial statements. Their personal financial statement listed the PMC stock as an asset but did not list Howard as sole owner. PMC's tax returns reflected losses ranging from $233,000.00 to $260,000.00 for the three preceding years.

The loan officer prepared an internal Bank document showing that the loan would be secured by two real estate mortgages, PMC assets, assignment of thesubcontract and personal guarantees of Howard and Sally.[2] The Bank's loan officer testified, based upon the submitted document, that he believed that PMC could not pay the loan itself and that the loan application was being made by PMC, Howard, and Sally. Moreover, he considered Sally to be an officer and director of PMC and able to conduct business affairs for PMC and that marital status was not a factor in the decision to make the loan or the manner in which the loan was secured.

According to the Bank's loan officer, the loan documents were prepared, then Howard and Sally were contacted and came to the Bank to close the loan. After receiving an explanation about the documents, they executed the documents individually and in theft corporate capacities as called for in the respective documents. Neither Howard nor Sally questioned the documents or the requirement for their individual guarantees and the mortgage of their home.

However, according to Sally, she did not know in advance that she would become personalty involved in the

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[2] Commercial Loan Worksheet, Plaintiffs Ex. 23. One mortgage covered their residence. The other mortgage covered commercial property they owned and leased to PMC.

loan and that the loan officer told them that her signature was required to "make the loan happen" Howard testified that he executed the documents because PMC had started the work on the government contract and needed the loan. Neither of them raised any question at the time about Sally's involvement and they were aware of the legal consequences of the documents they signed.

PMC was required to undertake additional work during the course of its work on the government subcontract. A dispute arose as to payment for the additional work and PMC filed a claim with the government for payment. The Bank's loan had not been repaid, although PMC had been paid under the terms of its base contract The dispute between PMC and the government became bogged down.[3] Howard testified that the Bank had no responsibility for PMC's dispute with the government.

Bank and PMC executed six written deferral agreements, one of which was also signed by Sally. These agreements extended payment for various periods of time ranging from 90 to 212 days and were made for the purpose of giving PMC additional time to prosecute its claim for payment for the additional work. The last extension expired April 1, 1994. The note remained unpaid and PMC's claim

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[3] The record indicates that the claim against the government was settled in December 1999, for the sum of $420,000.00. The prime contractor holds this money pending the outcome of this appeal.

against the government remained unresolved.[4] At the time of trial, the undisputed balance owed, including principal, interest, and costs, amounted to $513,107.74 with interest accruing at $85.00 per day.

According to the Bank's version of the events, a meeting with Howard and Sally was held on September 29, 1994, to discuss the loan status. The Bank's loan officer at the meeting testified that Howard advised that a meeting with the government was scheduled in 30 days to discuss PMC's claim. Howard also acknowledged the then status of the loan and wished to show "good faith" to the Bank. Howard advised that he had a life insurance policy with cash value which he would obtain and pay on the loan. Thereafter, Howard sent a series of letters to Bank on PMC letterhead and typed by Sally.

The first letter, dated October 7, 1993, advised Bank of the status of PMC's claim. Howard informed the Bank that a meeting with the government was scheduled later in October and that he expected some payments in the next three months. He further stated that, "after the next three months" he would review his assets and insurance in an effort to satisfy the loan. On November 17, 1994, Howard advised the Bank by letter

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[4] During the period deferral, the mortgaged real estate, occupied by PMC, securing the loan was voluntarily sold and the net proceeds applied to the loan. However, the loan did not reduce because the sum was used to pay PMC's bills, some associated with prosecution of the claim. The real estate sold was owned by Howard and Sally and was rented to PMC for $1,500.00 per month. They claimed to be damaged by loss of those rentals and the equity in the property.

of the claim status. On December 7, 1994, Howard, as insured, and Sally, as owner, executed a collateral assignment of the life insurance policy. The Bank's loan officer testified that an assignment was given rather than cash value in order to keep the policy in force.

The Bank's officers further testified that there was no agreement to defer the payment of the loan, especially for an indefinite period. The Bank's president testified that it was his unstated intent not to take action on the loan for about 90 days from the September meeting. The parties did not execute a written agreement for deferral on any terms or for any period. The Bank filed this action on February 21, 1995.

Howard and Sally agree, in their Brief that the September meeting occurred with both of them in attendance and that the insurance assignment was discussed at the meeting.[5] However, Howard testified that he understood that the pledge of the insurance policy would give him time to settle his claim against the government. Nevertheless, cross-

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[5] Appellees' Brief at page 2. This is at odds with Howard's and Sally's testimony. Howard testified that he believed Sally was not present then but that she might have been present. Pickens Transcript, p. 35, L. 23-4. Sally testified that she was not at the September meeting and that her meeting was December 7, 1994. She further testified that she did not know the purpose of the December meeting, but when she arrived the Bank asked what she and Howard could do to show good faith at which time the insurance policy was mentioned and assigned. She further testified that the Bank representatives stated then that the bank examiners were coming and something had to be done about the loan. Howard testified in similar fashion.

examination established that Howard had no specific discussions with the Bank officials to the effect that payment would be deferred until the claim was resolved. He stated he "felt that it was implied" and he acknowledged the absence of any written document which would demonstrate a deferral agreement.

Sally, likewise, did not establish any document or conversation pertaining to an agreement to defer payment with the insurance pledge. Cross-examination based upon pretrial discovery showed that she stated under oath that her counterclaims do not assert existence of such agreement. She and Howard claimed, however, that the Bank's request for the additional collateral to show good faith and then instituting reclosure was wrong full acceleration and bad faith on the part of the Bank.

The trial court directed the parties to submit findings of fact and conclusions of law. The trial court adopted those submitted by PMC, Howard, and Sally. Judgment was entered denying Bank's petition and granting judgment for PMC, Howard, and Sally on all issues. A monetary judgment was granted to PMC "in the amount Plaintiff sought on its note" for Bank's breach of duty of good faith and fair dealing. Howard was granted judgment "by way of recoupment" for Bank's breach of duty of good faith and fair dealing and violation of ECOA "in the amount Plaintiff sought on its note." Sally was granted monetary judgment for Bank's breach of duty of good faith and fair dealing "in the amount Plaintiff sought on its note" and the security documents she signed, including the insurance pledge, were cancelled for violation of ECOA. The trial court found that the evidence warranted punitive damages under 23 O.S. Supp. 1995, § 9.

Punitive damages "in the amount Plaintiff sought on its note" and further parenthetically defined as $513,107.74 with interest accruing at the rate of $85.00 per day from November 1, 1989, until the date of this order." The judgment does not say to whom the punitive damages are awarded or whether one or more of PMC, Howard, and Sally are the recipients, and if more than one, whether they are joint recipients of a single sum. The judgment was in excess of $1.5 million dollars, with interest accruing. The Bank appeals.

STANDARD OF REVIEW

In a civil action tried before the bench, the decision of the trial court, sitting as a trier of fact, is entitled to the same consideration, on appeal, as that given to a jury. *Dismuke v. Cseh,* 1992 OK 50,¶7,830 P.2d 188, 189-90. The proper standard of review in an action at law is that the findings of the trial court are as binding on appeal as the verdict of a jury, and if there is competent evidence to support the findings, they will not be disturbed on appeal. *Id.* The trial court's judgment, absent pure error of law, will not be disturbed on appeal if there is any competent evidence reasonably tending to the support the trial court's conclusion. *State v. $11,566.00,* 1996 OK CIV APP 67,919 P.2d 34. Where there is competent evidence to support trial court's finding of fact, appellate court cannot on appeal alter that finding, nor substitute its judgment for that of tlne trial court. *Id.*

The appellate court will exercise its "plenary, independent and non-deferential authority [when] reexamin[ing] a trial court's legal rulings," *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.,* 1996 OK 125, ¶4, 932 P.2d

1100, 1103 n.1; *Spielmann v. Hayes,* 2000 OK CIV APP 44, 3 P.3d 711. This Court's standard of review is *de novo* and gives no deference to the legal rulings of the trial court. *State, ex rel, Dept. of Human Services, ex rel, Jones v, Baggett,* 1999 OK 68,990 P.2d 235.

ANALYSIS AND REVIEW

ECOA Violation and Statute of Limitations

The ECOA provides that claims for violation of ECOA must be brought within two years of the date of the violation. 15 U.S.C.§ 1691 c(f). Here, the Bank's action and the ECOA counterclaim were brought more than two years after the date of the claimed violation, which is the date the loan was made, May 4, 1990. Moreover, the date of default, and thus the date the Bank's claim arose, was April 1, 1 994, at the expiration of tlae last deferral.

The first question is whether the claim is saved or barred by any of the provisions of 12 O.S.1991,§ 2013(C). Section 2013(C) provides:

> C. COUNTERCLAIM EXCEEDING OPPOSING CLAIMS; STATUTES OF LIMITATION. A counterclaim may or may not diminish or defeat tile recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party. Where a counterclaim and the claim of the opposing party arise out of the same transaction or occurrence, the counterclaim

> shall not be barred by a statute of limitation notwithstanding that it was barred at the time the petition was filed, and the counter claimant shall not be precluded from recovering an affirmative judgment. Where a counterclaim and the claim of the opposing party:
>
> 1. Do not arise out of the same transaction or occurrence;
>
> 2. Both claims are for money judgments;
>
> 3. Both claims had accrued before either was barred by a statute of limitation; and
>
> 4. The counterclaim is barred by a statute of limitation at the time that it is asserted, whether in an answer or an amended answer, the counterclaim may be asserted only to reduce the opposing party's claim.
>
> Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

This Court, and coincidently the same Panel of Judges, has decided this question in *Bank of Oklahoma, N.A.v. Briscoe,* 1985 OK CIV APP 156, 911 P.2d 311. There the Court was called upon to decide whether Briscoe could assert claims under the Truth In Lending Act, 15 U.S.C. §§ 1601 through 1667e (TLA), and the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 through 2617 (RESPA).

Both Acts contained a provision requiring that a claim be brought with one year of the date of violation.

Briscoe's claims arose when the loan was made, just as here. Also, Bank of Oklahoma's claim arose on a default date tha occurred after the expiration of one year from the date the loan was closed. The *Briscoe* Court held that the claims were barred, because "(w)here a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose." *Id.* at ¶3, p. 319. Even though Briscoe did not involve the ECOA, the facts and statutory provisions are legally indistinguishable from the facts and statutory provisions here, and dictate that the claim of Defendants was barred.

Therefore, the trial court erred in permitting a claim under ECOA for any purpose due to expiration of the Statute of Limitations. This includes basing a claim of fraud upon the assertion that the Bank mislead or misinformed Sally concerning her rights under ECOA. It then becomes unnecessary to examine whether a violation of ECOA in fact occurred and whether any party other than Sally has a claim.

The Remaining Claims

PMC, Howard, and Sally prevailed on their claims of estoppel and waiver, wrongful acceleration, fraud, and bad faith grounded in the circumstances surrounding the assignment of the insurance policy in December 1994. In summary, they claim that the Bank acted wrongfully when it obtained the assignment without deferring collection indefinitely and the consequences of the wrongful acts are that

they prevail on these theories.

The evidence and admissions here established that a meeting occurred in September 1994, attended by Bank officers, Howard, and Sally.[6] The loan was in default at that time and had been in default since April 1, 1994. The PMC claim against the government had been pending for several years without resolution and PMC was unable to pay the loan. The only remaining, tangible security for the loan consisted of the residential mortgage and the assignment of the proceeds from the government contact, but PMC's base contract had been paid by the government to PMC. The life insurance policy was discussed at this September meeting.

According to the Bank's version of the September meeting, Howard broached the idea of taking the cash value of the insurance policy and applying it to the loan within 90 days as a gesture of good faith. The Bank's president testified that he believed that within that time the loan would be paid either by resolution of the PMC claim against the government or by liquidation of assets securing the loan. He then decided to defer a decision on what specific action the Bank would take regarding collection. However, he specifically testified that no agreement was made to permit the loan to remain unpaid until the PMC claim against the government was settled. Finally, the Bank president stated that Howard's October 7, 1994, letter to the Bank generally was in accord

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[6] See note 4 regarding Sally's admission in her Brief that she attended the meeting.

with what transpired at the meeting.[7] The letter makes no mention of any agreement to defer action or payment until the claim against the government is settled.

According to Howard and Sally, the matter of the insurance policy arose in December 1994, when they were called into the Bank, advised that FDIC auditors were there, and that the Bank wanted something to show "good faith" on their part that the loan would be paid. Howard told the Bank officials that all they had was the insurance policy and the Bank officials then asked them to pledge the policy as soon as possible. Howard further testified that it was his understanding that by pledging the policy he would be allowed time to settle the claim against the government.

In his cross-examination, Howard acknowledged that he had no direct discussion with anyone from the Bank that payment of the loan would be deferred until the claim against the government was resolved. He stated that he "felt that it was implied, by our last meeting when the cash value of the insurance policy was pledged, that I was free to settle the claim." The parties agree that they did not enter into a written deferral agreement.

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[7] Plaintiff's Ex. 53. The letter stated that PMC is temporarily unable to service the debt and outlined the status of the claim process. The letter concluded that Howard would review his personal assets, including insurance, after three months in an effort to pay the loan if the claim did not produce results.

Waiver and Estoppel

The doctrine of waiver and equitable estoppel have much in common. The features distinguishing the two are: To constitute waiver, there must be such an intent on the part of the party alleged to have waived a right; to constitute estoppel, the essential element is not intent, but rather, action of another in reliance upon the conduct of the party allegedly estopped. *Bay Petroleum Corp. v. May,* 1953 OK 370, ¶6,264 P.2d 734,736. The issue of estoppel presents a mixed question of fact and law. "Equitable estoppel is generally understood to prevent one party from taking a position which is inconsistent with an earlier action that places the other party at a disadvantage. Equitable estoppel holds a person to a representation made, or a position assumed, where otherwise inequitable consequences would result to another, who has in good faith, relies upon the representation or position." *Oxley v. General Atlantic Resources, Inc.,* 1997 OK 46, ¶20, 936 P.2d 943, 947.

Estoppel may also arise when elements of fraud are present. *Steiger v. Commerce Acceptance of Okla. City, Inc.,* 1969 OK 78,455 P.2d 8 1 Syl., ¶14. When estoppel is based upon fraud, the elements consist of (1) a false representation or concealment of facts, (2) made with actual or constructive knowledge of the fact, (3) to a person without knowledge of, or the means of knowing, those, facts, (4) with the intent it be acted upon, and (5) the person to whom it was made acted in reliance upon it to its detriment. The essential element of estoppel is not intent, but rather, action on the part of another in justifiable reliance upon the conduct of the party allegedly estopped, *Indiana Nat. Bank v. State Dept. of Human Services,* 1993 OK 101, ¶24,857 P.2d 53, 64.

Last, promissory estoppel occurs when the facts necessary to establish promissory estoppel are present. These are: (1) a clear and unambiguous promise, (2) foreseeability by the promisor that the promisee would rely upon it, (3) reasonable reliance upon the promise to the promisee's detriment and (4) hardship or unfairness can be avoided only by enforcement of the promise. *Russell v. Board of County Commissioners,* 1997 OK 80, ¶27, 952 P.2d 492,503.

Here, the record does not support a finding of waiver or of promissory estoppel. PMC and the Pickens did not establish that the Bank intentionally waived any of its rights or that it unequivocally made a promise upon which they relied.

Similarly, the record does not support fraud-based estoppel. Howard acknowledged that no person from the Bank made any representation to him and that he implied an agreement on the part of the Bank. Sally's testimony was similar. The concealed fact, if any, would have to be that Bank did not intend, at that time, to defer payment of the loan until the claim against the government was resolved when it obtained the insurance as additional collateral in December 1994.

The rule in Oklahoma is that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise. This principle is an exception to the general rule that for a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts. *Citation Co. Realtors, Inc, v. Lyon,* 1980 OK 68, ¶8,610 P.2d 788, 790. The exception to the general rule

obtains where the promise to act in the future is accompanied by an intention not to perform and the promise is made with the intent to deceive the promisee into acting where he otherwise would not have done so. "The gist of the rule is not the breach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise so made and thereby deceive the promisee. There is a wide distinction between the nonperformance of a promise and a promise made *mala fide,* only the latter being actionable fraud." *Id.*

Here, there has not been maintained the distinction between the nonperformance of a promise and a promise made *mala fide,* and without any intention at the time of making it to perform it. All that Pickens' evidence has shown, assuming an implied promise or agreement to defer collection, is a nonperformance of that promise or implied agreement.

This leaves the first listed category of estoppel promised upon inconsistent positions. The parties dispute the circumstances under which the assignment of the policy occurred. When the policy was assigned in December of 1994, almost 90 days had passed since the September meeting where liquidation of personal assets had been discussed. The Bank did not, by its own admission, seek to obtain the cash value of the policy in December 1994, but instead took a policy assignment. This assignment gave the Bank alternatives to collect the cash value or continue insurance and become the beneficiary of the policy as long as the loan remained unpaid.

Viewed from Howard's and Sally's perspective, it would not be irrational to believe that they had time to pursue the government clam before action would be taken against

them. The matter had been ongoing for some eight years and the Bank had continually deferred collection of the note. But it is also true that previous deferrals had been for specific periods of time, and that there had never been any agreement by Bank to indefinitely defer collection.[8]

The defense of estoppel "has its roots in equity, and is governed by equitable considerations." *Chisholm v. House,* 183 F. 2d 698(C.A. 10 1950). Furthermore, estoppel may not be used to work a positive gain to a party. *First State Bank v. Diamond Plastics Corp.,* 1995 OK 21, ¶14, 891 P.2d 1262, 1272. When the suit was actually filed in March, 1995, the time had long passed for the meeting with the government described by Howard in his letter of October 7, 1994, Thus, the Defendants had received some extra time in which to collect the money which might repay the Bank loan. By the

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[8] The problem here is that new consideration in the form of an assignment of the life insurance policy, as opposed to liquidating the policy in order to make a loan payment, was given for a deferral. However, this in itself presents difficulties because while the offer was made to give new consideration for the Bank's delay in undertaking action, no specified time was requested or delineated by anyone. The Bank accepted the new consideration and did delay. In accepting, the Bank did not state the period of time it would delay. Both parties here looked to resolution of the government contract to pay off the loan. Neither apparently expected the additional years the resolution would take nor was it expected by either that more than a reasonable delay would be obtained by this new consideration. Thus, it cannot be said as a matter of law under these conditions and common sense that either party was misled or performed under a handicap tainted by fraud. The parties are not in a two ship *Peerless* category - each received a benefit.

time Defendants actually raised the defense of estoppel, in May, 1995, over six months had passed from the pledge of the insurance as collateral. That first pleading did little more than state the word "estoppel." By the time the defense was actually delincated to state the claim that an implied extension was gained by pledge of the life insurance policy, several more months had passed. It is not disputed that the claim against the government was not finally settled until December, 1999.

Under these circumstances, only an extension of five years on the note would have allowed Defendants the relief they sought -- the time needed to secure the government monies from which they could pay the loan, Clearly, there was never an agreement for such an extension, and viewing the testimony of the Pickens in its best fight it is clear that even they did not believe Bank had an obligation to forestall action on the note for such a lengthy period. Thus, this Court concludes there was no basis for equitable estoppel.

Wrongful Acceleration

The trial court's judgment that Bank wrongfully accelerated the note is premised upon the existence of an oral or implied agreement to defer collection. The parties did not enter into a written agreement for deferral as they had on each occasion prior to the last expiration on April 1, 1994. Such agreements must be in writing in order to be enforceable. 15 O.S.1991, § 140; *Big John's Lumber Co, of Muskogee, Inc. v. City Bank of Muskogee*, 1995 OK CIV APP 100, 901 P.2d 832.

PMC and the Pickens seek to avoid the application of Section 140 on the basis of their fraud claim, citing *Brown v. Founders Bank and Trust Co,* 1994 OK 130, 890 P.2d 855. *Brown* holds that a claim of fraud may be used to avoid the writing requirements of Section 140. There the Court reasoned as follows:

> Statutes similar to 15 O.S.1991, § 140 have been enacted to protect lenders from liability for actions or statelnents a lender might make in the context of counseling or negotiating with a borrower which the borrower construes as an agreement. They are intended to discourage lender liability litigation and to promote certainty into credit agreements. The statutes are intended as a reform measure to regulate the number and variety of causes arising as lender liability actions. Despite the intended protection afforded lenders under these statutes, their goal should be to protect the lender against claims raised by sophisticated borrowers not unsophisticated individuals who either because of lack of representation or bargaining power fail to be in a position to insist that the full agreements be reduced to writing. Statutes of frauds are enacted to prevent frauds not to perpetuate them. Such statutes are not intended to be used as shield or breastwork for a wrongdoer. Remaining silent when the duty to speak exists may constitute a wrongful act.

Id. 1994 OK 130 at ¶13, 890 P.2d at 862-63.

This Court ruled above that flaud-based estoppel does not exist here. However, this Court determines that it is necessary to examine the validity of the remaining fraud claims in order to review the application of such claims to the wrongful acceleration claim.

Fraud- Actual and Constructive

To constitute actionable fraud, it must be made to appear: (1) that defendant made a material representation; (2) that it was false; (3) that he made it when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff (5) that plaintiff acted in reliance upon it; (6) that he thereby suffered injury; and (7) that all these facts must be proven with a reasonable degree of certainty, and all of them must be found to exist, the absence of any of them would be fatal to a recovery. *Silk v. Phillips Petroleum Co.,* 1988 OK 93,¶¶12-13, 760 P.2d 174, 176-77.

As discussed under the heading "Estoppel," this Court views the facts fairly deduced from the evidence here as presenting the nonperformance of a promise as opposed to a promise made *mala fide*. Actionable fraud may only be had on the latter. The gist of the rule is not the brcach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise so made and thereby deceive the promisee. Again, all that Pickens' evidence has shown, assuming an implied promise or agreement to defer collection, is a nonperformance of that promise or implied agreement.

Howard and Sally also claimed actual fraud, citing 15 O.S. 1991, § 58.[9] The trial court found in their favor. The judgment and claim were based upon the events in September 1994. The finding by the trial court, and the argument here, asserts that at the September 1994 meeting, the notion of a pledge of additional assets was raised because no money was available to pay toward the note. The trial court found, and the argument continues here, that: (1) a bank official testified that the pledge would extend the loan, (2) Sally, relying on this offer, pledged the insurance in December 1994, (3) the note was thereby extended pending outcome of the government claim, and (4) Bank breached the agreement in

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[9] Section 58 provides:

Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact.

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

February 1995 by filing this action.

First, the judgment and argument fail to establish that the promise, whether in September or December of 1994, was made by the Bank with no intention of performing it. In fact, to the contrary, the finding by the trial court is that Bank breached its agreement. As discussed before, this is not fraud.

Second, Sally's testimony wholly contradicts the trial court's finding and their argument. Howard's testimony to a lesser degree also does the same. Sally denied even being present at the September meeting and testified that the first she knew of the insurance policy assignment matter was when she came to the Bank in December. On the other hand, the Bank's president testified that it was his intention to defer action for 90 days after the September meeting, however, he did not express that intent to Howard.

The Oklahoma Supreme Court stated in *Johnson v. Caldwell,* 1937 OK 327, 71 P.2d 620, 623 and again in *Silk*, 1988 OK 93 at ¶13, 760 P.2d at 177:

> It is the rule that fraud is a question of fact to be determined by the jury, but there must appear some reasonable proof of fraudulent intent. The mere fact that fraud is claimed will not justify the submission of that issue unless facts are produced from which an irresistible deduction of fraud reasonably arises. Fraud may not be presumed by the jury from circumstances; it must arise as does any other issue of fact from a preponderance of all the evidence. Deceit, fraud, and fraudulent intent

> arise from acts and conduct inharmonious with good faith and must emanate from clear and convincing proof.

Here, the evidence fails to meet the required standard of proof to find fraud, actual or constructive. In sum, the record here contains numerous contradictions and inconsistencies regarding what transpired in September and December 1994. The only clear conclusions that can be drawn from the evidence are: (1) the loan was in default and could not be paid; (2) the government claim was unresolved and resolution at any time was uncertain; (3) Sally owned an insurance policy on Howard's life which had cash value; (4) Howard continued to seek more time to resolve the government claim and proposed to obtain the cash value of the policy and apply it to the loan; (5) the Bank was amendable to giving more time, at least in September 1994, but the Bank officials did not expressly tell Howard that the loan date would be extended; (6) no additional collateral was provided at the September 1994 meeting, or for almost 90 days thereafter: (7) the insurance policy was assigned in December 1994; (8) the parties did not execute any written agreement to defer the loan for any period or upon any terms at the time of the assignment was given or thereafter; and (9) Howard assumed that an implied agreement existed to defer payment pending resolution of the government contract.

Therefore, this Court finds that the claim for actual fraud must be rejected both as an independent basis for relief and as a basis for wrongful acceleration of the note.

In their Brief, the Pickens argue that constructive fraud arose because of Bank's violation of ECOA by failing

to inform Sally that she did not have to participate in the loan under the terms of theECOA. They rely upon 15 O.S.1991, § 59.[10] Their argument does not demonstrate how, if at all, this justifies a monetary judgment against the Bank in favor of PMC.[11]

The argument does not elaborate, but rather assumes that a duty exists requiring the Bank to inform Sally concerning ECOA matters. Constructive fraud requires existence of a duty. *Silvery v. Slusher,* 1988 OK 53, ¶10,770 P.2d 878, 884. In *Silver* the Court found no duty to explain the Uninsured Motorists Coverage because the relationship was contractual, non fiduciary. *See First National Bank & Trust Co. of Vinita v. Kissee*, 1993 OK 96, ¶32, 859 P.2d

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[10] Section 59 provides:

Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud,

This Court notes that 6 O.S. Supp.2000, § 425, statutorily provides that the Bank would not be a fiduciary, however, that statute was not enacted until 1994.

[11] The Judgment does not distinguish among theories and right to recovery but appears to award each defendant actual and punitive damages premised upon all theories.

502, 510-1 1, where the Court said:

> "Oklahoma recognizes the common law rule that the relationship between an bank and its customer is not fiduciary in nature, but is that of creditor-debtor. In all cases, the determination of the existence of a fiduciary relationship depends upon the factual circumstances, including the relationship of the parties involved, to each other and to the disputed transaction."

Here, the promissory note signed by PMC and guaranteed by Howard and Sally states that no relationship other than debtor-creditor exists among the parties.

Therefore, a fiduciary relationship does not exist here and, as a result, no duty flows from such relationship. Moreover, this was not a consumer loan, but rather a loan to a company owned by educated persons. They had obtained substantial loans in the past for the business.

Next, the matter did not fall within the realm of consumer protection laws.[12] Although the ECOA is a ban on

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[12] See, e.g., the Uniform Consumer Credit Code, 14A O.S.1991, §§ 1-101 et seq. Its purposes include 1) furthering "consumer understanding of the terms of credit transactions" 14A O.S.1991, § 1-102 (2)(c), and 2) protecting consumers from unfair practices, 14A O.S.1991, § 1-102 (2)(d). Disclosure requirements are a primary means to achieve legislative intent. See, e.g., 14A O.S.1991, §§ 2-301 , 2-302 and 14A O.S. Supp. 2000, § 5-204. The insure greater protection, waiver of rights under the UCCC is

discrimination, it too is a regulatory statute. The statute makes no notification requirement similar to the UCCC, other than requiring an explanation for denial of credit.

Therefore, relief based upon constructive fraud, either independently or as a basis for wrongful acceleration, must be rejected.

Bad Faith

The tort of bad faith is not established simply by proving a breach of contract. The tortfeasor's unreasonable conduct constitutes the essence of the tort. *See Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶31, 11 P.3d 162, 174. An independent basis for imposition of tort liability must exist separate from breach of contract. *Beshara v. Southern Nat. Bank.*, 1996 OK 90, ¶33,928 P.2d 280, 289; *Rodgers v. Tecumseh Bank,* 1988 OK 36, ¶18,756 P.2d 1223, 1227.

Banks also have an obligation to exercise good faith and fair dealing with its customers. *First Nat. Bank and Trust Co. of Vinita,* 1993 OK 96 at ¶24, 859 P.2d at 509. However, the Oklahoma Supreme Court differentiates bad faith claims in insurance company cases from those of commercial banking relationships. *Id.,* 1993 OK 96 at ¶25, 859 P.2d at 509.

> To impose tort liability on a bank for every breach of contract would only serve to chill

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generally prohibited. 14A O.S. 1991, § 1-107 (1).

> commercial transactions. This is not to say that under every fact situation arising from a breach of contract that recovery may never lie, *Gross recklessness or wanton negligence on behalf of a party to a contract may call for an application of the theory of tortious breach of contract.*

Rodgers, 1988 OK 36 at¶16, 756 P.2 at 1227. (Emphasis added.)

Thus, this Court in its review must examine the circumstances to ascertain whether the evidence supports a conclusion that the Bank here was guilty of gross recklessness or wanton negligence. *Rodgers,* 1988 OK 36 at ¶16,756 P.2d at 1227.

In *Acord v. West,* 1966 OK 207, ¶I5, 421 P.2d 238, 241, the Supreme Court construed the word "wanton" as used by an Arizona jury in the special verdict returned by them and not otherwise defined, as the equivalent of the term "willful and malicious" for purposes of applying Bankruptcy law regarding discharge. Wanton or willful negligence does not necessarily connote an ill will toward the person injured or a specific intent to inflict the injury, but an act of negligence may be properly so classified if there is "an entire absence of care for the life, person or property of others which exhibits indifference to consequences.'" *Barall Food Stores v. Bennett,* 1944 OK 78, ¶28, 153 P.2d 106,109.

Oklahoma recognizes three degrees of negligence - slight, ordinary and gross. Gross negligence is defined by 25 O.S.1991, § 6, as the lack of slight care and diligence. The

question here is whether the Bank tortfeasor's negligence was either so flagrant, so deliberate, or so reckless that it is removed from the realm of mere negligence. It is well recognized that the intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty or property of another, may result in such a gross want of care for the rights of others and of the public that file finding of a wilful, wanton, deliberate act is justified. *Fox v. Oklahoma Memorial Hosp.*, 1989 OK 38, ¶5, 774 P.2d 459, 461. Under Oklahoma law, it is also recognized that "gross negligence" requires intentional failure to perform manifest duty in reckless disregard of consequences or in callous indifference to life, liberty, or property of another. Thus, a claim of gross negligence is the same as any negligence claim, differing only as to degree. *Martin v. A.C.G., Inc. d/b/a Tan & Tone America,* 1998 OK CIV APP 148, ¶8, 965 P.2d 995, 997. However, here in examination of the record, this Court cannot find where the evidence will support a claim of actionable negligence against the Bank.

The bad faith component of the trial court judgment here rests on a mixture of circum stances. The elements of bad faith, as determined by the trial court, consisted of (a) illegally obtaining Sally's guarantee; (b) inducing Sally to assign the insurance policy under false premises; (c) breaching the contract to defer collection; (d) failing to release a mortgage; and (e) liquidating personal assets pledged illegally to secure the loan. The only component common to all defendants is the finding of a breach of contract.

Element of damages determined by the trial court are: (1) mental anguish to Howard and Sally; (2) injury to all

defendant's credit reputation from failing to release the mortgage; (3) loss of rental income and equity in the mortgaged property; and (4) attorney fees in defense of the breach of agreement to defer collection.

Item (a) relates to the ECOA claim and is barred by the Statute of Limitations. The Bank correctly points out that, as to item (d), the closing title company paid over the proceeds, suggesting that a mortgage release was in existence, even though for some unexplained reason it was not recorded. In any event the record here contains no evidence reflecting any detriment suffered as a result of the fact that the mortgage was not released, including any damages to credit reputation, much less a degree of negligence amounting to gross negligence.

The Bank also correctly states that there is no evidence that it liquidated any personal assets. In fact, the record fails to indicate that Howard and Sally pledged any of their personal property other than the insurance policy and it was not liquidated. The commercial real estate was voluntarily sold by the Pickens, according to their testimony, because of the problems they were having due to the government claim. They testified that such problems did not involve the Bank in anyway. Thus, the claim for loss of rents and equity cannot stand.

The claim that Bank induced Sally to assign the insurance policy under false premises and then breached the contract to defer collection are interrelated. As shown above, breach of contract alone does not suffice. Second, the evidence here does not demonstrate the existence of false premises. Neither Howard nor Sally agreed to assign the

insurance policy in order to do the Bank a favor because of the presence of bank examiners. On the other hand, both of them assumed or hoped that the assignment would obtain more time from the Bank for them to resolve the claim against the government.

CONCLUSION

Based on the foregoing analysis, the judgment of the lower court must be and is reversed. The case is remanded to the trial court with instructions to enter judgment on the promissory notes in favor of Bank and against Defendant Pickens Mechanical Contractors, Inc., and Howard D. and Sally M. Pickens as guarantors, in the amount of $513,107.74 with interest accruing at the rate of $85 per day from November 1, 1999, until paid, and to include all court costs and attorney fees to which Bank may show its entitlement upon application. The court is further directed to foreclose Bank's mortgage and/or security interests in all the pledged collateral, in order to effectuate total payment to Bank, with, as much as possible, due regard for the interests of the Defendants. The trial court is also directed to enter judgment in favor of Bank on all counterclaims of Defendant, and, finally, is directed to render any equitable order needed in aid of foreclosure, including, if necessary, an order directing disposition of monies held by Caddell; and any and all other equitable relief to which Bank may be entitled.

REVERSED AND REMANDED WITH INSTRUCTIONS.

STUBBLEFIELD, J. (sitting by designation), and TAYLOR, J. (sitting by designation), concur.

March 19, 2002

APPENDIX C

IN THE DISTRICT COURT OF MCCLAIN COUNTY
STATE OF OKLAHOMA

CASE NO. CJ-95-73

[FILED AUGUST 4, 2000]

FIRST ENTERPRISE BANK,	)
Plaintiff,	)
	)
v.	)
	)
PICKENS MECHANICAL CONTRACTORS,	)
INC., HOWARD D. PICKENS and	)
SALLY M. PICKENS, husband and wife	)
Defendants.	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JOURNAL ENTRY OF JUDGMENT

The captioned matter, having been fully tried to the undersigned Judge, the Court hereby makes the following Findings of Fact, Conclusions of Law and Journal Entry of Judgment:

1. In early 1990, PMC [1] was attempting to obtain financing in order to assist it in performance of a government contract it has recently been awarded. Toward this end, PMC by and through Howard Pickens, its President and sole stock holder, contracted First Enterprise Bank ("FEB") to attempt to obtain the needed loan.

2. PMC's loan request (Defendants' Trial Ex. 29) dated March 28, 1990, was on PMC letterhead, signed by Howard D. Pickens, President of Pickens Mechanical Contractors, Inc. and requested a loan to PMC "secured by joint payment from the proceeds of contracts and company assets."

3. On or about April l 1, 1990, Howard Pickens was called back to the Bank to meet with Del Garrett, President of FEB, and the loan officer assigned to the account, Randy Smith. Howard Pickens was told at this meeting the loan would be made.

4. In reliance on the loan being made, on April 14, 1990, PMC began work on the government contract.

5. On May 4, 1990, Randy Smith instructed Howard Pickens to come to the Bank and sign the documents necessary to document the loan. Howard Pickens was instructed to bring his wife, Sally Pickens, with him.

---

[1] PMC was engaged primarily in the performance of mechanical contacting work such as the installation of piping and equipment.

6. In structuring the loan, contrary to the loan request made by PMC, the Bank required both Howard and Sally Pickens to unconditionally guarantee the loan and to pledge their homestead and other personal real estate, in addition to assignment of the government contract proceeds and company assets. (Defendants' Trial Ex. 50.)

7. Due to unanticipated and additional work required under the government contract, for which PMC went unpaid, PMC was unable to repay the FEB loan as scheduled. PMC submitted its claim for compensation for the additional work performed and is currently pursuing reimbursement through the governmental dispute resolution process.

8. Pending resolution of PMC's dispute over payment from the government, the loan was deferred on six (6) separate occasions with all accrued interest being paid at each deferral.

9. The last written deferral expired on April 1, 1994. No further written deferrals were executed between the parties. Throughout the period of these deferrals, PMC underwent a total liquidation of its assets in order to satisfy its vendors and creditors, including FEB

10. On September29, 1994, Howard and Sally Pickens met with their loan officer Randy Smith, and the new President of FEB Darell Klimeck, regarding the status of the loan. (Defendants" Trial Ex. 1 0,)

11. At this meeting, the parties agreed that the Pickens would pledge their last remaining unencumbered asset, an insurance policy with a cash value of $17,849.89.

12 The purpose of this pledge was to "defer action" on the Bank instituting legal proceedings to collect on the note until such time as PMC war able to resolve its dispute regarding payment under the government contract. (Trial testimony of Randy Smith and Darell Klimeck.)

13. The dividend attributed to the cash value of the insurance policy was used by Defeladants to pay the premium on the policy. Once the insurance became encumbered by the Bank, the dividend was no longer available to be used toward payment of the policy premium of $3,041.50 per year.

14. Once the insurance became encumbered by the Bank, Defendant Sally Pickens no longer had access to the cash value of the policy.

15. Sally Pickens, the owner of the policy, assigned same to the Bank on December 7, 1994, in accordance with the agreement, (Defendants" Trial Ex. 15.)

16. Darrell Klimeck testified at trial that at the time the paaies reached agreement to defer collection pending PMC's resolution of payment from the government contract in exchange for the pledge of insurance, he, in his own mind, and without revealing same to Defendants, was only goiog to forebear collection for a period of ninety (90) days. (Trial testimony of Darrell Klimeck.)

17. FEB filed suit to collect on the note, on February 21, 1995, prior to resolution of PMC's claim for payment from the government. (Defendants' Trial Ex. 57.)

18. Del Garrett, President of FEB at the time the loan was made (and originator of the PMC loan), testified that he never considered that Sally Pickens would be a guarantor on the loan when he approved the loan, that the proceeds of the government contract were a sufficient basis for making the loan to PMC, and that he turned the file over to Randy Smith to prepare the loan documents. (Trial testimony of Del Garrett.)

19. Neither PMC nor Howard Pickens were ever evaluated on an individual basis to determine their credit worthiness separate and apart from Sally Pickens. (Trial testimony of Randy Smith.

20. It is the written policy of the Bank to deplete all resources of a borrower prior to instituting legal action. (Defendant' Trial Ex. 54; trial testimony of Randy Smith and Darrel Klimeck.)

21. Sally Pickens has no ownership interest- in PMC.

22. Sally Pickens had no involvement in managing the day-to-day affairs of PMC.

23. Sally Pickens' sole involvement in PMC was to lend her name to the Board of Directors as Secretary to the corporation,

24. Sally Pickens was not a joint applicant for the loan requested by PMC.

25. Howard and Sally Pickens were required to pledge personal real estate (Lots 1 8 and 19, Block 1, Gateway Industrial Park, the "Gateway" properly), as welt as their homestead (Lot 8 of Block 2 in Whippoorwill Estates, McClain County) as security for the loan to PMC,

26. The Gateway property was sold on or about April 16, 1993 a-d the proceeds of $81,777.92 applied on the note. (Defendant' Trial Ex. 36.)

27. The Gateway property provided Howard and Sally Pickens with rental income of $1,500.00 per month, As of January' 1 O, 2000 (rent was due on the 10th of each month), Howard and Sally Pickens lost 81 months of rental income for a total of 5121,500.00 ($1,500.00 x 81) (Defendant" T-al Ex. 59.)

28. Despite payment of the mortgage on the Gateway property on April 16, 1993 (Defendants' Trial Ex. 36) Bank failed to release the mortgage on the property until March 13, I995 (Defendants' Trial. Ex. 51)nearly two years later.

29. Howard Pickens has suffered emotional distress as a result of the actions of the Bank.

30. Sally Pickens has suffered emotional distress as a result of the actions of the Bank.

CONCLUSIONS OF LAW
ESTOPPEL/WAIVER

1. The elements of an estoppel defense are:

   A. A false representation or concealment of material fact;

   B. Actual or constructive knowledge thereof by the party claimed to be estopped;

   C. The other party's lack of knowledge or means of knowledge of the real facts;

   D. An, intention that the representation or concealment should be acted upon: and

   E. Refinance or action thereon by the party claiming estoppel to his prejudice.

Walker & Withrow Inc., v. Haley, 653 P.2d 191, 193 (Okla. 1982).

2. Waiver is defined as "the voluntary and intentional relinquishment of a known right," *Deffenbaugh v. Hudson,* 791 P.2d 84, 86 (Okla. 1990).

3. Plaintiff s actions in inducing Sally Pickens to assign her insurance policy under the guise that this action would defer Plaintiffs collection on the PMC note until PMC resolved its claim for payment under the government contract

when Plaintiff's President, Darrell Klimeck, acknowledged at trial his true intent to delay collection for only 90 days regardless of the outcome of PMC's claim, clearly satisfies the element of estoppel.

4. Plaintiff voluntarily and intentionally relinquished its right to bring collection action by agreeing to accept the pledge of the insurance policy in exchange, while awaiting the outcome of the PMC claim,

WRONGFUL ACCELERATION

1. Oklahoma's Commercial Code states:

> Option to Accelerate at Will. A term providing that one party or his successor in interest may accelerate payment or performance or required collateral or addition collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith befieves that the prospect of payment or performance is impaired. The burden of estabfishing lack of good faith is on the party against whom the power has been exercised, 12A § 1-208.

2. Plaintiff bargained for and received a pledge of an insurance poficy to defer collection of the note pending resolution of PMC's claim for additional payment under its government contract.

3. There is no evidence Plaintiff believed that this prospect ofpayment was impaired.

4. Defendant proved Plaintiff's lack of good faith through the testimony of Plaintiffs President Darrell Klimeck. Mr. Klimeck revealed at trial that despite agreeing upon an open-ended time frame for resolution of the government claim, he only intended to defer action for 90 days. This fact was not revealed to Defendant at the time the insurance was pledged.

5. Plaintiff's acceleration and subsequent collection efforts were wrongful.

6. Defendants have been damaged by Plaintiff's wrongful acceleration.

CONSTRUCTIVE FRAUD/FRAUD

1. Title 15 O.S. 1991, §59 provides:

Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

This "breach of duty" identified in §59 has been defined by case law as "some legal or equitable duty." *Silver v. Slusher,* 770 P.2d 878, 881 at note 11 citations omitted) (Okl. 1988). Furthermore, "liability for constructive fraud may be based on a negligent misrepresentation. Even without misrepresentation may constitute fraud where there is an underlying right to be correctly informed of the facts." *Gentry v. American Motorist Ins. Co.,* 867 P.2d 468 (Okl. 1994). Clearly, Sally Pickens had a right to be correctly informed of the fact that under the ECOA, Plaintiff could not require her to guarantee the loan and/or pledge personal assets to secure the loan. It is this breach of Plaintiffs legal duty under the ECOA that gives rise to Sally Pickens' claim to constructive fraud.

Actual fraud is defined as follows:
Okla. Stat. tit. 15, §58:

> Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contact, or with his connivance, with intent to deceive another party hereto, or to induce him to enter into the contract:
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not bdieve it to be true.
>
> 2. The positive asse-ion in a manner not warranted by the information of the person

making it, of that which is not true, though he believe it to be true.

3. The suppression of that which is true, by one having knowledge, or belief of the fact.

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

The deposition testimony of Darrell Klimeck; the President of the Bank, shows that during the September 1994 meeting, Mr. Klimeck requested the Pickens make some form of payment on the note pending the outcome of the government claim, When the Pickens indicated that they had no funds available to make such a payment, the idea was brought out that perhhps the Pickens could pledge additional assets as collateral on the note. Darrell Klimeck testified that if the Pickens were to pledge additional assets as collateral on the loan, this pledge would serve as an extension on the note. In response to this offer, Sally Pickens, on December 7. 1994, executed an assignment of an insurance policy, with a cash value of approximately $18,000 and a death benefit of to $300,000 to the Bank. As per the representations of Darrell Klimeck, this pledge was to extend the due date on the note pending outcome of the government claim. However, on February 21, 1995, the Bank breached this agreement and began foreclosure proceedings. Based on these facts, Defendants committed fraud in procuring the assignment.

BAD FAITH

1. A bank has a duty to exercise good faith and deal with it's customers. An action for breach of this implied covenant, in the context of a commercial contract between a bank and its customer, is cognizable under Oklahoma law where "gross recklessness or wanton negligence on behalf of a party" is shown. *First National Bank and Trust v. Kissee*, 859 P.2d 502, 509 (Okl. 1993), and Beshara v. Southern National Bank, 928 P.2d 280, 288 (Okl. 1996).

2. Plaintiff's conduct in illegally obtaining Sally Pickens' guarantee on the note, in inducing Sally Pickens to assign to it additional personal assets (the insurance poficy) to defer the loan under false pretenses, in breaching the contract to defer collection action, in failing to release the mortgage on the Gateway property nearly for nearly two years after payment, and in liquidating personal assets pledged illegally to secure the loan, meets this standard.

3. By virtue of Plaintiffs breach of its duty of good faith and fair dealing, Defendants have suffered damages and are entitled to recover therefor.

4. Defendant's damages include mental anguish (as to the individual Defendants Howard and Sally Pickens), injury to credit reputation as to all Defendants for failing to release the Gateway property mortgage, loss of rental income and equity in the Gateway property (as to the individual Defendants), and attorney fees incurred in defending this action by virtue of Plaintiff's breach of the agreement to defer collection (as to all Defendants).

ECOA CLAIMS

1. The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C, § 1691, et. seq., was enacted by Congress to prohibit creditors from discriminating against credit applicants on certain enumerated bases. In particular. the Act provides (at 15 U.S.C. § 1691 (a)(1)):

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction --
>
> > (1) on the basis offace, color, religion, national origin, sex or marital status, or age (provided the appficant has the capacity to contract).

2. In addition, the Federal Reserve Board has issued regulations to govern the interpretation and implementation ofthe ECOA. These regulations are found at 12 C.F.R. § 202.1, et seq. Defendants herein assert Plaintiff has violated the Act by discriminating against them based on marital status - that the only reason they were made to guarantee the loan to Pickens Mechanical Contractor's Inc., was based on their martial status.

> The implementing regulation at 12 C.F.R. § 202.7(d)(1) provides:
>
> > Except as provided in this subsection, a creditor shall not require the fignature of an applicant's spouse or other person, other than a joint

> applicant, on any credit instrument if the applicant qualifies under the creditors standard of credit worthiness for the amount and terms of the credit requested.

3. The Commercial Loan Worksheet prepared by FEB, as well as PMC's request for the subject loan, both unequivocally indicate that the credit applicant was the corporate Defendant, PMC. This being the case, FEB's requirement that the Pickens individually guarantee the corporate debt was a clear violation of the ECOA.

4. FEB asserts its innocence by claiming that neither PMC nor Howard Pickens were ever evaluated on individual basis to determine their credit worthiness without consideration of Sally Pickens' assets. However not only is it not a defense to liability under the ECOA, it is in fact a violation of the ECOA. See Riggs v. Nat. Bank of Washington, D.C. v. Linch, 36 F.3d 370, 374 (4th Cir. 1994) (determinative factual issue on EOAC claim is whether bank made determination that husband was not independently credit-worthy before it requested wife to guarantee loan).

5. Although an affirmative clam for relief under the ECOA may be barred by limitation, an affirmative defense to liability on the note is not. *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511 (D.Kan. 1995); and, *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995) *quoting from Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 700-01, 70 L.Ed. 1421 (1935) in holding that claims by way of recoupment are "never barred by the statute of limitations so long as the main action is timely."

6. Plaintiff's violation of the ECOA entitled Sally Pickens to relief from her obligations under the guaranty, mortgages and security agreements she executed.

7. Plaintiff's violation of the ECOA entitles Howard Pickens to relief by way of recoupment. *Integra Bank/Pittsburg v. Freeman,* 839 F.Supp. 326 (E.D.Pa. 1993).

8. A creditor may not look for payment from parties who, but for the ECOA violation, would not have incurred personal liability on the underlying debt in the first instance. *Integra Bank/Pittsburg v. Freeman,* 839 F.Supp. 326 (E.D.Pa 1993); *Silverman v. Eastrich Multiple Investor Fund, L.P.,* 51 F.3d 28 (3rd Cir. 1995); *F.D.I.C. v. Medmark, Inc.,* 897 F.Supp. 511 (D.Kan. 1995).

ACTUAL DAMAGES

1. The Defendants have proved their estoppel and waiver defenses and Plaintiff has waived its right and is estopped from proceeding with further collection efforts pending final resolution of PMC's dispute over payment under the government contact.

2. The assignment of the insurance policy was procured by fraud and/or unlawful means and it is hereby canceled.

3. The guarantee, mortgages and security agreements executed by Sally Pickens were secured in violation of the ECOA and are hereby canceled.

4. Plaintiffs violation of the ECOA entities Howard Pickens to relief by way of recoupment.

5. The Plaintiff breached its duty of good faith and fair dealing owed to all three Defendants.

6. Defendant Sally Pickens is entitled to judgment for actual damages for Plaintiff's breach of the duty of good faith and fair dealing and fraud in the amount sought by Plaintiff on its note.

7. Defendant Howard Pickens is entitled to judgment by way of recoupment and for Plaintiff's breach of the duty of good faith and fair dealing in the amount sought by Plaintiff on its note.

8. Defendant PMC is entitled to judgment by virtue of Plaintiffs breach of the duty of good faith and fair dealing in the amount sought by Plaintiff on its note.

PUNITIVEDAMAGES

1. Paragraph G of 23 O.S. §9.1, Oklahoma's current punitive damages statute, provides: "G. This section shall apply to all civil actions filed after the effective date of this act." The effective date is August 25, 1995. As this action was filed prior to that date, the controlling punitive damages is 23 O.S. §9.

2. There is clear and convincing evidence that the Plaintiff is guilty of conduct evincing a wanton or reckless disregard for Defendants' rights, oppression, fraud or malice, and therefore, the Court is free to award punitive damages

without percentage limitation.

3. The amount of punitive damages awarded, for the sake of example and by way of punishing the Plaintiff, is the amount sought by Plaintiff on its note ($513,107.74 with interest accruing at the rate of $85.00 per day from November 1, 1999, until the date of this order) as is alleged owed by Plaintiff in its Requested Findings of Fact and Conclusions of Law.

/s/ _____
Noah H. Ewing, Jr.
Associate District Judge, McClain County

APPENDIX D

IN THE DISTRICT COURT OF MCCLAIN
STATE OF OKLAHOMA

Case No. CJ-95-73

[Filed October 25, 2000]

FIRST ENTERPRISE BANK, Plaintiff,	)
v.	)
PICKENS MECHANICAL CONTRACTORS, INC., HOWARD D. PICKENS, and SALLY M. PICKENS, husband and wife, Defendants.	)

TRANSCRIPT OF PROCEEDINGS
(First Day Only)

HELD BEFORE THE HONORABLE NOAH EWING
on th 1st day of November, 1999
at Purcell, Oklahoma

APPEARANCES:

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Pages 1-172

[P. 35]for this loan?

A I'm assuming -- well, I don't know. I don't remember.

Q Had you met Sally -- was Sally Pickens present that day?

A You had not met Sally Pickens before that time?

Q Her name was not mentioned in that first meeting?

A I can't say that she was or was not.

Q Did you believe that Sally Pickens was trying to apply for that loan at that point in time?

A As I said, I wasn't aware whether it was Howard or whether it was Mechanical. I did ask where the contract was, and it was to the -- and it was to the Howard Mechanical - or Pickens Mechanical Contractors.

Q That was the primary source of repayment on this loan?

A Sir?

Q Was that the primary source of repayment on this loan?

A That was the primary collateral.

Q What was the primary source of repayment?

A I suppose it would have been from that contract.

Q At that point in time would that contract have supported that loan?

A I'm sorry?

Q Would that contract, the government contract, and the assets of Pickens Mechanical support this loan request?

[P.36]

A If everything on it has been performed correctly, I would assume that it would have been.

Q Would you turn to Defendant, s Exhibit 29, please.

MR. DICKEY: May I approach the witness?

THE COURT: Yes.

MR. DICKEY: I think you've got the wrong book, Mr. Garrett.

THE COURT: "Which one are you in, plaintiff's or defendant's?

MR. DICKEY: Defendant, s 29.

Q (By Mr. Dickey) do you see that letter, sir?

A Yes.

Q Who is that from?

A It's from Pickens Mechanical Contractors.

Q And it's not signed, but it's got a signature block for Howard D. Pickens, President?

A Uh-huh.

Q Does this adequately– or, does this reflect, looking at the third paragraph, the loan request that was made?

And I'll read the third paragraph. "Our banking needs will consist of a floating line of credit of $300,000 secured by joint payment from the proceeds of contracts and company assets. In addition, a stand-by letter of credit of $300,000 secured by personal real estate."

A What was the question?

[P.134]
didn't take me very long at all to just look at those documents five minutes to figure that out. So I didn't do anything more than that.

Q You didn't do any independent credit analysis?

A My independent credit analysis was sitting down and looking at those documents. It didn't take me very long at all to make that determination, that they were

not creditworthy. So whether you call that an analysis or not, don't know.

MR. DICKEY: May I approach the witness, Your Honor?

THE COURT: Yes, go ahead.

Q (By Mr. Dickey) I'd like to hand you a copy of your deposition that was given November 7,1995, in this action.

A Blow the dust off of it.

MR. DICKEY: Would the Court like a copy?

THE COURT: Yes, that will be fine.

(Document handed to the Court.)

Q (By Mr. Dickey) Would you turn to page 57, please. At line 17.

I'd asked you the question, quote, "So is it -air to say, then, that Pickens Mechanical was not individually evaluated for this loan?" And Mr. Brown objects.

And your response is, quote, "I didn't specifically look at Pickens Mechanical Contractors to see what they could or [P.135] could not do."

MR. BROWN: Again, Judge, I'd ask that he continue to read his full answer.

Q Continuing on, "Again, I evaluated all the documents that were given to me and went from there."

A It's a matter of how you interpret. Again, you know, it didn't take me but that long, 20 seconds, five minutes, whatever that may be, to look at what information that was submitted to me.

I don't know what your, as an attorney -- as a banker, I look at a full evaluation. I didn't get out a Lotus spreadsheet and a chart and everything else to try to see what we could do. The information that I saw at the very beginning directed my course.

Q Was Howard Pickens, in connection with his loan, ever evaluated individually for his creditworthiness ?

A Never really had the documents to be able to do that to begin with. I got joint financial statements, joint tax returns, all on the individual side of it. I had personal– I mean, corporation information out there. Everything was thrown together. I didn't have anything really to honestly look at individuals, whether it be Howard, his brother, or Sally, or anybody else.

Q If I understand your answer, sir are you saying you didn't have enough information to do that. So therefore it [P.136] wouldn't have been done; is that correct?

A I would say that the information that was given to me, I did not have the ability to do" that. I was given joint financial statements. I was given joint tax

returns.

Q Did Mr. Garrett, Del Garrett, approve this loan?

A Yes.

Q When did he do that?

A Prior to the consummation of the credit. Some 30, 60 days, I'm sure, prior to the closure of the loan. I don't have an exact date for you.

Q He had approved the loan. Did he tell you who he had approved the loan to?

A No, he did not. Again, as I said earlier, when Mr. and Mrs. Pickens came in to visit with Mr. Garrett, Mr. Garrett said, Get your stuff together, come in, meet Randy Smith, go from there. And I got a stack of information.

Q And Mr. Garrett was the one who did approve this loan?

A Yes.

Q Thirty--

A Thirty, 60 days prior to the consummation of this note, I would say that's -- yes.

Q Did you just indicate that -- well, let me do it this way. When was the first time you met Sally Pickens?

A I would say -- I don't have an exact date, but I would say two to three weeks prior to the closure of this loan.

[P.137]

Q What was the occasion that you had that you met her?

A Pardon me ?

Q What was the occasion?

A They came into the bank either to deliver some specific documents or -- you know, I don't have an exact recollection of what we discussed.

Q Had you ever met her prior to that time?

A Prior to them coming into the bank?

Q Yes. I'm sorry. This was the first time that you had met?

A That's the first time I'd ever met them was when they came to the bank. I did not know them before then.

Q And it's your testimony Sally Pickens was in the bank prior to May 4, 1990, when these documents were executed?

A Absolutely.

Q Tell me again what occurred in that meeting.

A Which meeting?

Q The first time you met them. Was this the first time you met Howard?

A I think I -- I've never met Howard before then. No, I didn't know Howard before he came to the bank.

What occurred during that meeting, you know, I'm sure it was a get-to-know-you meeting. Hi, I'm Randy Smith, I'm vice president. I'm going to be working putting loan documents together for you. Do you have any questions, et cetera....

IN THE DISTRICT COURT OF MCCLAIN
STATE OF OKLAHOMA

Case No. CJ-95-73

[Filed April 5, 2000]

FIRST ENTERPRISE BANK, Plaintiff,	)
v.	)
PICKENS MECHANICAL CONTRACTORS, INC., HOWARD D. PICKENS, and SALLY M. PICKENS, husband and wife, Defendants.	)

TRANSCRIPT OF PROCEEDINGS

Presided by: THE HONORABLE NOAH EWING

Date: April 5, 2000

Time: I0 a.m.

Taken at: McClain County Courthouse Purcell, Oklahoma 73080

Ordered: August 30, 2000

Completed: February 28, 2001

APPEARANCES:

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[P.7]

Q. Did you have any involvement in attempting to negotiate the terms of that loan?

A. No.

Q. There are some exhibits in evidence. You did sign loan documents?

A. Yes.

Q. Those loan documents, I believe, are dated May 4th, 1990. Can you tell me when the first time that you actually traveled to First Enterprise Bank?

A. Yes, the day of --

Q. When was that?

A. The day that we signed the loan documents. And that was May 4th, 1990?

A. Correct.

Q. Had you ever been in the Bank before that time?

A. No.

Q. Had you ever spoken with anybody at the Bank before that time?

A. No.

Q. Tell me why you went to the Bank on May 4, 1990.

A. My husband called me at home and told me that I needed to meet him at the Bank, that he had to go there to sign some loan documents and he did not know what I would have to sign, but ! needed to be there.

Q. And you went there?

[P.8]

A. Yes.

Q. Would you tell us about that? I guess you and your husband went in separate vehicles?

A. Correct.

Q. Okay, tell me -- tell me about that. When you got to the Bank, what occurred?

A. When I got to the Bank, they took me to Randy Smith's office. There was a space there at a desk for me to sit. There was a big stack of loan documents there. And after I was introduced to him, I looked down at the stack of documents and I said, "Are these for me to sign?" And he said, "That's what it takes to make the loan."

Q. Randy Smith told you that?

A. Yes.

Q. Who was in the office at that time?

A. Mr. Pickens and Mr. Smith and myself.

Q. Did Mr. Smith -- you said there was a stack of documents --

A. Yes.

Q. -- there for you? Did Mr. Smith explain to you what the stack of documents was?

A. I really can't remember what he told me about the documents.

Q. Did he explain them one by one to you?

A. I can't remember.

[P.9]

Q. Okay. Did *you* know at the time that you were signing these documents that your house was going to be mortgaged?

A. NO.

Q. Before you got to the Bank, did you have any idea what the collateral was

A. No

Q. -- for this loan?

A. I thought the contract was the collateral. I had just assumed that.

Q. Okay, so the loan was consummated -- or you signed the documents. Were there any other -- well, just tell us what happened next. Anything else occur that day? Did you meet or talk to anybody else at the Bank that day?

A. I was introduced to Mr. Garrett. Mr. Pickens and myself went to his office and I met him, and that's really about all I can remember.

Q. Okay. When is the next time after May 4th that you went back to the Bank, if ever?

A. I went one time and made a deposit for Mr, Pickens.

Q. Okay. You know when that was?

A. No.

Q. Did you talk to Mr. Smith or anybody else there connected with this loan that you recall?

A. No.

Q. When is the next time that you had some sort of

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[P.30]

MR. DICKEY: Defendants' 18.

Q. (By Mr. Dickey) Despite your loan request, Mr. Pickens, this Agreement to Pledge indicates that you pledged two separate pieces of real estate, as well as the assignment of the contract rights and company assets?

A. Yes.

Q. And you were also required to guarantee the note, weren't you, sir? That's Defendants' Exhibit 3.

A. Yes, ! signed this. This is my signature.

Q. All right, turn to Defendants' Exhibit S. Your wife, Sally Pickens, was required to guarantee the note also?

A. Yes, this is Sally's signature.

Q. Now, your request was not for all that?

A. No, sir, but I'd been working on this job. I was already under construction and working on this job for some three or four weeks and one of the reasons that the cash flow requirements were so high on that March 28th date for the first month, that's reflective of the activity that was going on.

Q. Okay. You signed the loan documents on May 4, 1990.Tell me about what occurred May 4, 1990.

A. Someone called me from the Bank and told me -- it may have been Randy or it may have been his secretary, I don't recall who, but someone called me from the Bank and told me that the loan documents were ready for signature and to bring Sally with me. And I called Sally and told her to meet me at [P.31] the Bank, and I arrived at the Bank before Sally did. She had to come from home and I came -- went from the office which was some 18 miles closer. And I arrived at the Bank and I went to Randy's office, and I signed the loan documents prior to Sally arriving.

Q. Okay. You signed the Guaranty Agreement and you pledged this real estate?

A. I signed everything that was stacked up in front of me.

Q. And why did you do that?

A. It was a necessity for me to proceed with the contract of which I'd already been working on three or four weeks.

Q. Had Randy Smith or anybody else at the Bank ever discussed, with you, the structure of this loan and these pledges of real estate and Guaranty Agreements prior to you getting there on May 4, 1990?

A. No, there was no prior discussions to that date.

Q. And you felt this was a requirement to get the loan?

A. That' s correct.

Q. All right, so you're there and you've signed the documents- Take us forward from that point.

A. I had completed signing the documents and within a few minutes after that, Sally arrived and I went out and brought her in to Randy's office and introduced her to Randy, and she sat down and signed all the documents for the loan.

Q. What happened next, if you -- that was it, you left the..

Supreme Court U.S.
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No. 02-436

In The

Supreme Court of the United States

PICKENS MECHANICAL CONTRACTORS, INC.; HOWARD D. PICKENS AND SALLY M. PICKENS, HUSBAND AND WIFE,

Petitioners,

v.

FIRST ENTERPRISE BANK, OKLAHOMA CITY, OKLAHOMA

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioner Pickens Mechanical Contractors, Inc. is a small closely-held corporation formerly engaged in the mechanical contracting business. Petitioners Howard D. Pickens and Sally M. Pickens are married and have been and remain the officers and directors of Pickens Mechanical Contractors, Inc.

Respondent, First Enterprise Bank of Oklahoma City, Oklahoma is a banking corporation organized under the laws of the State of Oklahoma with its four branches and principal place of business located in Oklahoma City, Oklahoma. There is no parent or publicly held company that owns 10% or more of First Enterprise Bank's stock.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
MISSTATEMENTS OF FACT AND LAW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. Jurisdiction Will Not Lie Because The Federal Questions Were Not Raised Below	4
II. The State Court Judgment Rests On Independent And Adequate State Grounds	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 4, 5

Bank of Oklahoma v. Briscoe, 911 P.2d 311 (Okla.Ct.App. 1996) 1, 6

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 7

John v. Paullin, 34 S.Ct. 178, 231 U.S. 583, 58 L.Ed. 381 (1913) 8

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) 7

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 7

Stephens v. Household Finance Corporation, 566 P.2d 1163 (Okla.1977) 7

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) 4, 6

FEDERAL STATUTES:

15 U.S.C. §§1691-1691f 1

15 U.S.C. §1691d(a) 2

15 U.S.C. §1691e(f) 5

28 U.S.C. §1257 4

STATE STATUTES:

12 O.S. 1991, §2013(C) ..... *passim*

OTHER AUTHORITIES:

12 C.F.R. §202.7(d)(4) 2

MISSTATEMENTS OF FACT AND LAW

Petitioners contend the decision of the "state courts of last resort conflict with decisions of United States Courts of Appeal." (Petition for Writ of Certiorari, p. 3). The federal cases Petitioners cite have no bearing on whether Petitioners' counterclaims could be used in the District Court of McClain County in the State of Oklahoma. None of the cited cases involve the application of a state procedural law like Oklahoma's, 12 O.S. 1991, §2013(C), prescribing the use of all counterclaims brought in Oklahoma's state courts. The Federal Rules of Civil Procedure do not contain a provision similar to 12 O.S. 1991, §2013(C) which provides, in part:

> Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

The Oklahoma Court of Civil Appeals opinion addressing Petitioners' Equal Credit Opportunity Act (hereafter "ECOA"), 15 U.S.C. §§1691-1691f, counterclaims rests on Oklahoma state law, 12 O.S. 1991, §2013(C), rests on Oklahoma case law, *Bank of Oklahoma v. Briscoe*, 911 P.2d 311 (Okla.Ct.App. 1996), and is not in conflict with decisions of the United States Courts of Appeal.

Petitioners make numerous factual arguments concerning the merits of their ECOA counterclaims. The Oklahoma Court of Civil Appeals never reached the merits of the alleged ECOA violations because it first held Petitioners were barred from using those counterclaims for any purpose by application of 12 O.S. 1991, §2013(C).

Petitioners contend the "Oklahoma Civil Appeals Court and the Supreme Court of the State of Oklahoma

both ignored the federal case law as to Petitioners' rights . . ." (Petition for Writ of Certiorari, pp. 4, 6). Petitioners never mentioned or addressed Oklahoma's controlling procedural statute covering the use of counterclaims, 12 O.S. 1991, §2013(C), in either their Answer Brief to the Oklahoma Court of Civil Appeals or in their Petition for Certiorari to the Oklahoma Supreme Court. Respondent argued at the trial court level and again on appeal in state court that Petitioners' ECOA counterclaims could not be used for any purpose pursuant to 12 O.S. 1991, §2013(C). Petitioners never disputed the fact their ECOA counterclaims were time-barred before Respondent's claims arose and did not present on appeal any reason, constitutional or otherwise, why 12 O.S. 1991, §2013(C) was not applicable.

Petitioners suggest Respondent somehow violated the Equal Credit Opportunity Act by obtaining a mortgage on Petitioners' home. (Petition for Writ of Certiorari, pp. 6-7, 13-14). The Equal Credit Opportunity Act and the regulations written under the Act specifically permitted Respondent to obtain Petitioners' signatures on the home mortgage. 15 U.S.C. §1691d(a); 12 C.F.R. §202.7(d)(4).

STATEMENT OF THE CASE

Respondent filed a foreclosure action in the District Court of McClain County, State of Oklahoma, against Petitioners seeking judgment on a $300,000.00 promissory note, judgment on personal guarantees and foreclosure of a mortgage and security agreements. Petitioners filed counterclaims of estoppel/waiver, wrongful acceleration, fraud/constructive fraud, bad faith and violation of the

Equal Credit Opportunity Act. After a bench trial the trial court entered judgment for Petitioners on all of their counterclaims and entered judgment against Respondent on all of its claims. The trial court awarded Petitioners actual damages in the approximate amount of $1,500,000.00 and punitive damages in the approximate amount of $500,000.00.

Respondent appealed the judgment to the Oklahoma Supreme Court, which assigned the case to the Oklahoma Court of Civil Appeals. The Oklahoma Court of Civil Appeals, in an unpublished opinion, reversed the trial court's judgment and remanded the case with directions to enter judgment in favor of Respondent on its claims and against the Petitioners on their counterclaims. In its opinion the Oklahoma Court of Civil Appeals generally found that the trial court erred in its application of Oklahoma law to the facts and that Petitioners produced no evidence or insufficient evidence to sustain their burden of proof on the claims of estoppel/waiver, wrongful acceleration, fraud/constructive fraud and bad faith.

The Oklahoma Court of Civil Appeals applied Oklahoma's procedural statute on the use of counterclaims, 12 O.S. 1991, §2013(C), to the undisputed facts and ruled that Petitioners were barred from using the Equal Credit Opportunity Act counterclaims for any purpose because their counterclaims were time-barred before Respondent's claim arose.

Petitioners then filed their Petition for Certiorari with the Oklahoma Supreme Court. The Oklahoma Supreme Court denied the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

Petitioners' arguments in support of certiorari fail for two simple reasons. First, Petitioners' constitutional challenges were neither properly presented to nor addressed by the Oklahoma Court of Civil Appeals or the Oklahoma Supreme Court. Second, the Oklahoma Court of Civil Appeals opinion rests on independent and adequate state grounds.

I. Jurisdiction Will Not Lie Because The Federal Questions Were Not Raised Below.

In order for jurisdiction to lie pursuant to 28 U.S.C. §1257, a substantial federal question must have been properly raised in the state court proceedings. This Court has consistently refused to decide federal constitutional issues raised for the first time on review of a state court's decision. *Webb v. Webb,* 451 U.S. 493, 499, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981). This Court has long adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to the state court that rendered the decision. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). Petitioners failed to properly present to the Oklahoma Court of Civil Appeals or the Oklahoma Supreme Court the constitutional issues which they now raise in their Petition for Writ of Certiorari.

Petitioners argue review should be granted because "unconstitutional discrimination against spouses of borrowers is being allowed and encouraged despite the Equal Credit Opportunity Act." Petitioners wholly failed to raise this "unconstitutional discrimination" argument to either

the Oklahoma Court of Civil Appeals or to the Oklahoma Supreme Court. Even in their Petition for Writ of Certiorari before this Court, Petitioners failed to make a "constitutional" argument as to why the ruling by the Oklahoma Court of Civil Appeals is infirm.

On appeal in state court the Petitioners made no constitutional attack on 12 O.S. 1991, §2013(C). Petitioners simply ignored this statute, which served as the basis for the Oklahoma Court of Civil Appeals ruling on Petitioners' ECOA counterclaims. Petitioners presented no argument on appeal in Oklahoma that a federal statute existed which would dictate how ECOA counterclaims are to be used in a state court action. ECOA's statute of limitations, 15 U.S.C. §1691e(f), is silent on the use of counterclaims.

On appeal in Oklahoma the Petitioners merely cited inapplicable decisions from federal courts addressing the use of ECOA counterclaims in actions filed in federal courts. On appeal in state court the Petitioners cited no authority and made no argument that the State of Oklahoma should ignore its own procedural statute, 12 O.S. 1991, §2013(C).

Petitioners contend they have been denied due process. Petitioners did not raise any constitutional claims or even mention the phrase "due process" in their Answer Brief to the Oklahoma Court of Civil Appeals or in their Petition for Certiorari to the Oklahoma Supreme Court.

When the highest state court is silent on a federal question, this Court will assume that the issue was not properly presented. *Adams, supra,* at 86, 117 S.Ct., at 1029. The Petitioners bear the burden of defeating this assumption by demonstrating that the state court had "a

fair opportunity to address the federal question that is sought to be presented here," *Webb, supra*, at 501, 101 S.Ct., at 1894. Petitioners have not met their burden of showing that the constitutional issues were properly presented on appeal in Oklahoma.

Petitioners have failed to show the Oklahoma appeals courts' failure to deal with the constitutional challenges was anything other than want of proper presentation. Because Petitioners failed to raise their federal constitutional claims in the state court proceedings and because the Oklahoma Court of Civil Appeals failed to rule on a federal issue, this Court should decline review.

II. The State Court Judgment Rests On Independent And Adequate State Grounds.

Consideration of any federal question, if found to exist, should be precluded by the existence of independent and adequate state grounds supporting the Oklahoma Court of Civil Appeals opinion. The Oklahoma Court of Civil Appeals decision to preclude Petitioners' ECOA counterclaims rests squarely on Oklahoma's procedural statute addressing the use of counterclaims, 12 O.S. 1991, §2013(C) which provides, in part:

> Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

The decision also rests squarely on Oklahoma case law, *Bank of Oklahoma v. Briscoe*, 911 P.2d 311 (Okla.Ct.App. 1996) (where defendant's counterclaims were time-barred before plaintiff's claims arose, defendant was precluded by

12 O.S. 1991, §2013(C) from raising those counterclaims in defense of plaintiff's action against him).

Under traditional choice of law principles, the law of the forum state governs on matters of procedure. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10, 104 S.Ct. 1473, 1480 n. 10, 79 L.Ed.2d 790 (1984). The Oklahoma Supreme Court has recognized "laws of set-off, counterclaim and recoupment are generally procedural and relate to the remedy and not to the right." *Stephens v. Household Finance Corporation*, 566 P.2d 1163, 1165 (Okla. 1977). The use of Petitioners' ECOA counterclaims in Oklahoma state court was a procedural issue, properly determined under Oklahoma procedural law, 12 O.S. 1991, §2013(C).

Petitioners never disputed the following facts: their ECOA counterclaims arose on May 4, 1990; ECOA provides a two (2) year statute of limitations; their ECOA counterclaims must have been brought by May 4, 1992 or be time-barred; Respondent's claim on the note, mortgage and guarantees arose after April 1, 1994; and Petitioners' ECOA counterclaims/defenses were not filed until May 12, 1995. The Oklahoma Court of Civil Appeals merely applied the controlling Oklahoma statute addressing the use of counterclaims to the undisputed facts before it and concluded Petitioners' barred ECOA counterclaims could not be used for any purpose.

This Court has long adhered to the principle that it will not review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). State law and practice are no less applicable when federal rights are in controversy than

when the case turns entirely upon questions of local or general law. *John v. Paullin*, 34 S.Ct. 178, 178-179, 231 U.S. 583, 585, 58 L.Ed. 381 (1913). Because the Oklahoma Court of Civil Appeals decision rests on adequate and independent state grounds, review by this Court is not warranted.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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